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IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA AND
UNITED STATES DEPARTMENT OF AGRICULTURE,
Petitioners,

v.

UNITED FOODS, INC.,
Respondent.

**On Writ of Certiorari to
the United States Court of Appeals
for the Sixth Circuit**

BRIEF AMICI CURIAE FOR THE AMERICAN MUSHROOM INSTITUTE, THE NATIONAL CATTLEMEN'S BEEF ASSOCIATION, INC., THE AMERICAN SOYBEAN ASSOCIATION, THE NATIONAL MILK PRODUCERS FEDERATION, THE MILK INDUSTRY FOUNDATION, THE UNITED EGG PRODUCERS, INC., AND THE UNITED EGG ASSOCIATION, INC., IN SUPPORT OF PETITIONERS

WAYNE R. WATKINSON
RICHARD T. ROSSIER
MCLEOD, WATKINSON & MILLER
One Massachusetts Ave., N.W.
Washington, D.C. 20001
(202) 842-2345

JOHN G. ROBERTS, JR.*
DAVID G. LEITCH
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5810

*Counsel of Record

Counsel for Amici Curiae

28 pp

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BRIEF AMICI CURIAE FOR THE AMERICAN MUSHROOM INSTITUTE, ET AL., IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST[1]

The American Mushroom Institute ("AMI") is a nationwide nonprofit trade association that represents mushroom producers, processors, buyers, and others involved in providing services and supplies to the mushroom industry. Its membership of more than 100

[1] Pursuant to this Court's Rule 37.6, we note that no part of this brief was authored by counsel for any party, and no person or entity other than the amici curiae filing this brief made a monetary contribution to the preparation or submission of the brief.

commercial mushroom farms in the United States represents more than 90 percent of domestic mushroom production. AMI's members directly benefit from the mushroom promotion program conducted by the Mushroom Council pursuant to the Mushroom Promotion, Research, and Consumer Information Act of 1990, 7 U.S.C. §§ 6101-6112 ("the Mushroom Act"), the statute held unconstitutional by the Sixth Circuit in this case.

The National Cattlemen's Beef Association, Inc. ("NCBA"), which traces its lineage back to 1898, is a Colorado nonprofit corporation that acts as the primary national representative of the domestic cattle industry. NCBA members directly benefit from the promotion program undertaken by the Cattlemen's Beef Promotion and Research Board pursuant to the Beef Promotion and Research Act of 1985, 7 U.S.C. §§ 2901-2911.

The American Soybean Association ("ASA"), is a national, not-for-profit, grassroots membership organization that develops and implements policies to increase the profitability of its members and the entire soybean industry. ASA provides support services to its 28,500 producer members and 26 state affiliates, to its agribusiness sponsors, to farm broadcasters and journalists, and to export customers located in more than 100 countries. ASA's members represent a large percentage of the more than 70 million acres of soybeans planted each year in the United States. ASA's members directly benefit from the promotion programs conducted by the United Soybean Association, pursuant to the Soybean Promotion, Research, and Consumer Information Act of 1990, 7 U.S.C. §§ 6301-6311.

The National Milk Producers Federation ("NMPF"), founded in 1916, is the principal national representative for American dairy producers and the milk marketing cooperatives they own and operate. The members of NMPF's 27 cooperatives produce the majority of the U.S. milk supply, making the NMPF the voice of over 55,000 dairy producers nationwide. NMPF's members directly benefit from the promotion program conducted by the Dairy Promotion and Research Board pursuant to the Dairy Production Stabilization Act of 1983, 7 U.S.C. §§ 4501-4538.

The Milk Industry Foundation ("MIF"), founded in 1908, is a trade association that represents approximately 160 member companies that process, distribute, and market approximately 85 percent of the U.S. market for fluid milk, yogurt, cottage cheese, sour cream, soft cheeses, egg nog, cream, dairy dressing, and dips. MIF's members directly benefit from the promotion programs conducted by the National Processor Advertising and Promotion Board pursuant to the Fluid Milk Promotion Act of 1990, 7 U.S.C. §§ 6401-6417, and the Dairy Promotion and Research Board pursuant to the Dairy Production Stabilization Act of 1983, 7 U.S.C. §§ 4501-4538.

The United Egg Producers, Inc. ("UEP"), is a Georgia nonprofit trade association representing the majority of American egg producers. UEP's members directly benefit from the promotion program of the Egg Board pursuant to the Egg Research and Consumer Information Act of 1980, 7 U.S.C. §§ 2701-2718.

The United Egg Association, Inc. ("UEA"), is a District of Columbia nonprofit trade association representing the majority of American egg processors. UEA's

members also directly benefit from the Egg Board's promotion program.

In this case, Sixth Circuit held unconstitutional the Mushroom Act and the mushroom promotion program which directly benefits the members of amicus curiae AMI. Furthermore, the Sixth Circuit's First Amendment analysis—which departs from this Court's analysis in *Glickman* v. *Wileman Brothers & Elliott, Inc.*, 521 U.S. 457 (1997)—threatens the numerous other agricultural commodity promotion programs established pursuant to federal and state law, including the beef, soybean, dairy, and egg promotion programs that directly benefit the members of amici curiae NCBA, ASA, NMPF, MIF, UEP, and UEA.

This brief is filed with the written consent of all parties pursuant to this Court's Rule 37.2(a); the requisite consent letters have been filed with the Clerk.

INTRODUCTION

In *Glickman* v. *Wileman Brothers & Elliott, Inc.*, 521 U.S. 457 (1997), this Court considered a federal program requiring members of the California tree fruit industry to pay assessments used to fund the generic promotion of plums, peaches, and nectarines. Against the claim of some industry members that such assessments unlawfully compelled speech in violation of the First Amendment, this Court held that the program was constitutional—indeed, that the program did not even raise "a constitutional issue." *Id.* at 477.

The Sixth Circuit has now held that the promotion program carried out pursuant to the Mushroom Act

violates the First Amendment. This is not because of some difference between plums and mushrooms. Instead, the Sixth Circuit distinguished *Wileman* on the ground that the California tree fruit industry is "heavily regulated," while "there appears to be a relatively free market in mushrooms." Pet. App. 3a, 5a. Thus, in the Sixth Circuit's view, the constitutionality of a promotion program under *Wileman* "must turn on the degree of regulation of the industry." *Id.* at 4a.

The Sixth Circuit exhibited considerable reluctance to follow *Wileman*, which it disparaged (citing two law review items) as a "controversial 5-4 decision." *Id.* at 3a & n.2. It also seemed eager to strike down the Mushroom Act, which it derided as the product of "interest group lobbying," *id.* at 5a n.3, despite the admonition in *Wileman* that "[d]oubts concerning the policy judgments that underlie many features of this legislation" do not detract from "the constitutionality of these marketing orders." 521 U.S. at 476.

As this Court has said, "[j]udging the constitutionality of an Act of Congress is properly considered the gravest and most delicate duty" performed by the federal judiciary. *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 319 (1985) (internal quotation marks omitted). For this reason, this Court has long instructed that federal statutes must be presumed constitutional. *See Reno* v. *Condon*, 528 U.S. 141, 148 (2000) ("We of course begin with the time-honored presumption that the DPPA [Driver's Privacy Protection Act] is a 'constitutional exercise of legislative power.' ") (quoting *Close* v. *Glenwood Cemetery*, 107 U.S. 466, 475 (1883)). The Sixth Circuit ignored this admonition and misread the

Court's decision in *Wileman*. Its judgment should be reversed.

SUMMARY OF ARGUMENT

There can be no serious dispute that the speech funded by the Mushroom Act is neither ideological nor political. It is, after all, about mushrooms. The Sixth Circuit nevertheless found the compelled subsidy of that speech unconstitutional. Its decision focused on the level of industry regulation, and it held that what it perceived to be the relatively low level of collectivization in the mushroom industry rendered the speech not germane to any valid, comprehensive regulatory scheme, and that the subsidy was therefore unconstitutional.

The Sixth Circuit's decision was clearly wrong under *Wileman*. This Court's opinion there made plain that compelled funding of speech that is nonideological and nonpolitical—like the speech at issue here—raises no First Amendment issue and should be reviewed under the standard appropriate for review of economic regulation. That holding did not depend on any "germaneness" inquiry. In any event, even if such an inquiry were appropriate, it was met here. The speech at issue was not only germane to a valid governmental purpose; it was *itself* the governmental purpose.

In addition, the nature of the speech at issue—government speech—should preclude any First Amendment challenge. It is speech by an entity—the Mushroom Council—established pursuant to federal law to achieve defined governmental objectives. The members of the Council are appointed by a governmental officer and its activities are subject to his direction and control. While the First Amendment limits governmental interference

with private speech, it does not limit speech of the government itself. Because that is precisely what is at issue here, the First Amendment challenge should be rejected.

ARGUMENT

I. COMPELLED FUNDING OF NON-POLITICAL SPEECH RAISES NO FIRST AMENDMENT ISSUE.

The Sixth Circuit construed this Court's opinion in *Wileman* to mean that compelled funding of speech is constitutional only if the funded speech is not political or ideological *and* is germane to a legitimate collective program. The court below held that "[o]ur interpretation of *Wileman* is that if either of the two elements is missing * * * the First Amendment invalidates the compelled commercial speech." Pet. App. 7a. The Sixth Circuit's reading of *Wileman* on this point was central to its decision; while it concluded that the germaneness test was not satisfied, it conceded that the speech funded by the Mushroom Act is nonpolitical or nonideological. *See id.*

The court below erred in its interpretation of *Wileman*. *Wileman* identified three grounds to distinguish the regulatory scheme at issue there from "laws that we have found to abridge the freedom of speech protected by the First Amendment." 521 U.S. at 469-470 (discussing fact that marketing orders "impose no restraint on the freedom of any producer to communicate any message to any audience," "do not compel any person to engage in any actual or symbolic speech," and "do not compel the producers to endorse or to finance any political or ideological views"). None of these factors—all of which are equally satisfied here—turns in any way

on the level of industry regulation involved or the germaneness of that regulation to the speech at issue. Instead, the Court's opinion established that in the absence of the concerns that animated earlier First Amendment decisions, the marketing order would be reviewed under "the standard appropriate for review of economic regulation." *Id.* at 469.

While the *Wileman* Court certainly did mention a germaneness inquiry when considering its cases that provide "affirmative support for the proposition that assessments to fund a lawful collective program may sometimes be used to pay for speech over the objection of some members of the group," *id.* at 472-473, the critical passage in *Wileman* is the Court's holding that the *Abood-Keller*[2] "test is clearly satisfied in this case because (1) the generic advertising of California peaches and nectarines is unquestionably germane to the purposes of the marketing orders and, (2) in any event, the assessments are not used to fund ideological activities." 521 U.S. at 473.

Unlike the Sixth Circuit, Justice Souter and the three Justices who joined him in dissent took this to mean that "a compelled subsidy of speech does not implicate the First Amendment if the speech *either* is germane to an otherwise permissible regulatory scheme *or* is nonideological, *so that each of these characteristics constitutes an independent, sufficient criterion for upholding the subsidy*." *Id.* at 483 n.3 (Souter, J., dissenting) (emphases added). In support of his understanding of the Court's opinion, Justice Souter noted that

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[2] *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209 (1977); *Keller* v. *State Bar of Cal.*, 496 U.S. 1 (1990).

the Court had said that " '*in any event*, the assessments are not used to fund ideological activities.' " *Id.* (emphasis in original). Significantly, the Court did not dispute his reading. *See The Supreme Court, 1996 Term—Leading Cases*, 111 Harv. L. Rev. 197, 326 (1997) ("the [*Wileman*] Court stated that compelled speech must be political or ideological to warrant First Amendment protection").

Justice Souter's reading of *Wileman* is correct. This Court emphasized in *Wileman* that there is no "broad First Amendment right not to be compelled to provide financial support for any organization that conducts expressive activities" but rather there is only "a First Amendment interest in not being compelled to contribute to an organization whose expressive activities conflict with one's 'freedom of belief.' " 521 U.S. at 471 (quoting *Abood*, 431 U.S. at 235). *See id.* at 478 (Souter, J., dissenting) (calling this passage "[t]he nub of the Court's opinion"). Thus, the Court in *Wileman* held that there was no First Amendment issue because "requiring respondents to pay the assessments cannot be said to engender any crisis of conscience." *Id.* at 472.

The rule of *Wileman* is that compelled funding of speech raises no First Amendment issue unless the speech is political or ideological. *See Gerawan Farming, Inc.* v. *Lyons*, 12 P.3d 720, 743 (Cal. 2000) (*Wileman* stands for the proposition that "the First Amendment's right to freedom of speech does not protect commercial speech against compelled funding"). This rule is perfectly sensible as a matter of First Amendment law. Compelled funding of speech imposes "no restraint on the freedom of any[one] to communicate any message to any audience." *Wileman*, 521 U.S. at 469. Nor

is someone compelled to fund speech forced "to engage in any actual or symbolic speech." *Id.* A compelled funding claim is thus far removed from the center of what the First Amendment prohibits, and for that reason a limiting principle is appropriate.

Political speech, unlike commercial speech, is at the very core of the First Amendment. *See R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 422 (1992) (Stevens, J., concurring in the judgment) ("Our First Amendment decisions have created a rough hierarchy in the constitutional protection of speech. Core political speech occupies the highest, most protected position; commercial speech * * * [is] regarded as a sort of second-class expression"); *Boos* v. *Barry*, 485 U.S. 312, 318 (1988). Thus, this Court's rule in *Wileman* that compelled funding of speech implicates the First Amendment only when political or ideological communication is funded was a sensible line to draw.

As noted, there is no dispute in this case that the mushroom "advertising is 'nonideological' or 'nonpolitical' in nature." Pet. App. 7a. Under *Wileman*, that should have been the end of the First Amendment inquiry.

II. THE MUSHROOM ACT SATISFIES THE GERMANENESS TEST.

Assuming that the nonpolitical nature of the speech at issue here does not dispose of respondent's compelled funding claim, the Sixth Circuit nevertheless erred when it held that "the mushroom advertising program before us is not 'germane' to any collective program setting prices or supply." Pet. App. 7a.

In *Wileman*, this Court noted that " '*Abood* held that a union could not expend a dissenting individual's dues for ideological activities not "germane" to the purpose for which compelled association was justified.' " 521 U.S. at 473 (quoting *Keller*, 496 U.S. at 13). Here, the purpose of the Mushroom Act is not to collectivize the mushroom industry but to establish a "program of promotion, research, and consumer and industry information designed to" benefit the mushroom industry and expand mushroom markets. 7 U.S.C. § 6101(b). Generic mushroom advertising is not merely germane to that goal, it is the very essence of the program. The court below was wrong to conclude that a promotion program is not germane unless it is part of a larger scheme of industry collectivization.

III. THE SPEECH FUNDED PURSUANT TO THE MUSHROOM ACT IS GOVERNMENT SPEECH AND THEREFORE DOES NOT IMPLICATE THE FIRST AMENDMENT.

Even if *Wileman* were distinguishable from this case for some reason—which it is not—that would not compel the conclusion that the Mushroom Act is unconstitutional. This Court in *Wileman* did not consider whether the speech at issue was government speech and therefore not subject to First Amendment challenge. *See* 521 U.S. at 482 n.2 (Souter, J., dissenting) (citing *Keller*, 496 U.S. at 10-13, and *Abood*, 431 U.S. at 259 n.13 (Powell, J., concurring in the judgment)). In this case, we urge the Court to consider the argument and to resolve the threshold question of the very application of the First Amendment in cases such as this. As we explain, the proper resolution of that question will put to rest First Amendment challenges to the various promo-

tional programs such as that contained in the Mushroom Act.

1. Like private citizens and corporations, government at various levels regularly contributes its voice to the marketplace of ideas. As the Third Circuit has noted:

> Citizens' tax dollars purchase a considerable amount of "government speech." Not only does the government speak on behalf of its citizens when it airs advertisements warning of the dangers of cigarette smoking or drug use, praising a career in the armed services, or offering methods for AIDS prevention, each time the President of the United States meets with a foreign dignitary, or state department officials enter into arms control negotiations, the government is engaging in expressive activities on behalf of everyone. [*United States* v. *Frame*, 885 F.2d 1119, 1131 (3d Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990).]

See also Block v. *Meese*, 793 F.2d 1303, 1313 (D.C. Cir.) (rejecting view that marketplace of ideas is "one in which the government's wares cannot be advertised") (Scalia, J.), *cert. denied*, 478 U.S. 1021 (1986); *Student Gov't Ass'n* v. *Board of Trustees of Univ. of Mass.*, 868 F.2d 473, 482 (1st Cir. 1989) ("In addition to its role as a regulator, the state plays an important role as a participant in the marketplace of ideas."); *American Jewish Congress* v. *City of Chicago*, 827 F.2d 120, 134 (7th Cir. 1987) ("Speech by the government is common.") (Easterbrook, J, dissenting).

This speech necessarily is paid for by citizens who may or may not agree with the government's message. That fact, however, provides no basis for preventing the

government from taking and communicating a position on issues of public concern, or for any individual to demand the return of his money if he happens to disagree with the government's message.

As the Court explained in *Keller*, 496 U.S. at 12-13:

> Government officials are expected as a part of the democratic process to represent and to espouse the views of a majority of their constituents. With countless advocates outside of the government seeking to influence its policy, it would be ironic if those charged with making governmental decisions were not free to speak for themselves in the process. If every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed.

See also Lee v. *Weisman*, 505 U.S. 577, 591 (1992) ("the very object of some of our most important speech is to persuade the government to adopt an idea as its own").

Furthermore, as a practical matter, effective government would come to a grinding halt if every person had a right to insist that his money not be used to support programs or positions with which he disagrees. *See Block* v. *Meese*, 793 F.2d at 1313 (discussing the "practical problems of excluding the government from ideological debate"); *see also Penthouse Int'l, Ltd.* v. *Meese*, 939 F.2d 1011, 1015-16 (D.C. Cir. 1991), *cert. denied*, 503 U.S. 950 (1992). *Cf. United States* v. *Lee*, 455 U.S. 252, 260 (1982) ("The tax system could not function if

denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief.").

Accordingly, the First Amendment simply does not provide a legal basis for objecting to government speech. The First Amendment limits government interference with *private* speech; it does not limit government speech itself. Thus, while the First Amendment ordinarily prohibits the government from regulating speech on the basis of its content, the Court has "permitted the government to regulate the content of what is or is not expressed *when it is the speaker or when it enlists private entities to convey its own message.*" *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995) (emphasis added). As then-Judge Scalia put it in *Block* v. *Meese*: "The short of the matter is that control of government expression * * * is no more practicable, and no more appealing, than control of political expression by anyone else. * * * [T]he guarantee of freedom of speech does not * * * prevent government from adding its own voice to the many that it must tolerate." 793 F.2d at 1314 (internal quotation omitted). *See also Brown* v. *Palmer*, 915 F.2d 1435, 1445 (10th Cir. 1990) (First Amendment must not be construed to "unduly chill[ ]" government speech), *aff'd*, 944 F.2d 732 (10th Cir. 1991) (en banc).

2. The first factor to consider in determining whether speech is government speech is the obvious one: who is doing the speaking? This Court provided clear guidance on how to answer that question in *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374 (1995). That case makes clear that entities such as the Mushroom Council

are government instrumentalities for First Amendment purposes.

In *Lebron*, the National Railroad Passenger Corporation (better known as Amtrak) refused to allow the petitioner to display an advertisement of a political nature on a large illuminated billboard controlled by Amtrak. The question for the Court was whether Amtrak should be considered part of the government for First Amendment purposes. The Court's answer was yes. The Court succinctly stated its holding in the final paragraph of its opinion: "We hold that where, as here, the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment." *Id.* at 400.

The three factors that led the Supreme Court to conclude that Amtrak "is part of the Government for purposes of the First Amendment"—(1) creation of the entity by special law; (2) furtherance of governmental objectives; and (3) retention of appointment authority—are all present here and compel the same conclusion with respect to the Council. As to the first factor, the Council was "created by a special statute." *Id.* at 397. *See* 7 U.S.C. § 6104(b)(1)(A) (providing for establishment of the Council). Second, the Council was created "explicitly for the furtherance of federal governmental goals." 513 U.S. at 397. *See* 7 U.S.C. § 6103(a) (Secretary's orders establishing Council are intended to "effectuate the declared policy of § 6101(b)"); *id.* § 6104(c) (powers and duties of the Council). The Act was accompanied by congressional findings explaining

that "the production of mushrooms plays a significant role in the Nation's economy" and that "the maintenance and expansion of existing markets and uses * * * for mushrooms are vital * * * to the agricultural economy of the Nation." *Id.* §§ 6101(a)(2), (5). The purpose of the Act, according to Congress, was "to strengthen the mushroom industry's position in the marketplace," to "maintain and expand existing markets and uses for mushrooms," and to "develop new markets and uses for mushrooms." *Id.* § 6101(b).

These "governmental objectives" (*Lebron*, 513 U.S. at 398) were reaffirmed with the passage of the Federal Agricultural Improvement and Reform Act (the "FAIR Act"). With specific reference to the Mushroom Act, Congress found that "[i]t is in the national public interest and vital to the welfare of the agricultural economy of the United States to maintain and expand existing markets and develop new markets and uses for agricultural commodities through industry-funded, Government-supervised, generic commodity promotion programs." 7 U.S.C. § 7401(b)(1). The promotion programs were found "to further the governmental policy and objective of maintaining and expanding markets for the covered commodities." *Id.* § 7401(b)(8)(B). In short, the Mushroom Act was clearly enacted for a public purpose.

As to the third *Lebron* factor, it is clear that the members of the Council serve "under the direction and control of federal governmental appointees." *Lebron*, 513 U.S. at 398. The Secretary of Agriculture appoints all of the members of the Council, *see* 7 U.S.C. § 6104(b)(1)(B), and his order establishes the powers and duties of the Council. *Id.* § 6104(c). Again, this

point was reaffirmed with the passage of the FAIR Act. *See* § 7401(b)(2) (commodity promotion programs are "supervised by the Secretary of Agriculture"); *id.* § 7401(b)(8) (commodity promotion programs are "under the required supervision and oversight of the Secretary of Agriculture").

In sum, there can be little doubt after *Lebron* that the Council is an "instrumentalit[y] created to enable the Secretary of Agriculture to communicate his message that [mushrooms are] good." *Frame*, 885 F.2d at 1131. Therefore, because the speech that United Foods is complaining about is the government's own speech, its First Amendment claim cannot succeed.

3. The Third Circuit in *Frame* ultimately declined to conclude that the speech at issue was government speech because, in its view, "where the government requires a publicly identified group to contribute to a fund earmarked for the dissemination of a particular message associated with that group" there is a "coerced nexus" between the message and the individuals who comprise the group. 885 F.2d at 1132. By contrast, that "nexus between the message and individual is attenuated," the court said, "[w]hen the government allocates money from the general tax fund to controversial projects or expressive activities." *Id.* That analysis is fundamentally flawed.

The focus of the government speech inquiry is—and should be—on the entity that conveys the message at issue and on the process through which that message has been formulated. The focus is not—and should not be—on whether or to what extent the message might be ascribed to an individual (other than the speaker) as a result of the "nexus between the individual and the

specific expressive activity." 885 F.2d at 1132. The latter inquiry lacks any firm grounding in established First Amendment doctrine and provides a wholly unworkable rule of decision for distinguishing between government and non-government speech.

The Third Circuit derived its "nexus" analysis solely from footnote 13 of Justice Powell's concurrence in *Abood*, 431 U.S. at 259 n.13, which states:

> Compelled support of a private association is fundamentally different from compelled support of government. * * * [T]he reason for permitting the government to compel the payment of taxes and to spend money on controversial projects is that the government is representative of the people. The same cannot be said of a union, which is representative only of one segment of the population, with certain common interests.

See 885 F.2d at 1132-33. The pertinent distinction drawn by Justice Powell was not, as the Third Circuit apparently thought, the "nexus" between the individual and the message to which he objects. Instead, the distinction drawn was between being forced to associate with *private* speech—which is derived from "one segment of the population, with certain common interests"—and with *government* speech—which is derived from the government as "representative of the people." *Abood*, 431 U.S. at 259 n.13.

Thus, in determining whether the speech activities at issue in *Keller* constituted government speech, this Court focused on the entity that conveyed the message—the State Bar Association—and *not*, as would have followed under the Third Circuit analysis, the

"nexus" between the association's members and the message to which they objected. Because the Court concluded that the association was not like a typical government agency or official, who "[is] expected as a part of the democratic process to represent and to espouse the views of the majority of [its] constituents," 496 U.S. at 12, the Court concluded that the messages it conveyed were not government speech. *Id.* at 13.

By contrast, here it follows under *Lebron* that the entity conveying the message to which United Foods objects—the Council—*is* a government instrumentality for First Amendment purposes. *See supra* at 15-17. Moreover, this case is distinguishable in a second, perhaps even more fundamental, respect. Here, unlike in *Keller*, the message being conveyed—mushroom promotion—was formed in the first instance by *Congress* "as a part of the democratic process." 496 U.S. at 12. The Council was created by Congress with the express purpose of conveying that *particular* message to the public. It does so pursuant to precise governmental regulations and subject to the ongoing guidance and control of the Secretary of Agriculture.

No such governmental definition and control characterized the activities of the State Bar in *Keller*. The Court made clear that the messages at issue in that case represented the views of a particular group—the Bar—on a wide and changing array of issues.[3] Here the mes-

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[3] The Bar was alleged to have been engaged in such far ranging—and openly political—activities as "endors[ing] a gun control initiative, disapprov[ing] statements of a United States senatorial candidate regarding court review of a victim's bill of rights, endors[ing] a nuclear weapons freeze initiative, and oppos[ing] federal legislation limiting federal-court jurisdiction over abor-

sage at issue was fixed by the representative of all the people—Congress—and is implemented by the Secretary. Although that message may be beneficial to a particular group—which justifies having them fund its dissemination—there is no doubt that it is the government's message.

The government may—and frequently does—use "private entities to convey a governmental message," or "to transmit specific information pertaining to its own program." *Rosenberger*, 515 U.S. at 833. When it does so, the government speech analysis still applies in analyzing objections to the message or specific information being conveyed by the private entities. *E.g.*, *Rust* v. *Sullivan*, 500 U.S. 173 (1991). But this case does not even involve the enlistment of private entities to convey the government's message. Here, the government's message is being conveyed by *government* bodies created by Congress specifically for that purpose and placed under the direct supervision of *government* officials like the Secretary. *See supra* at 15-17. In these circumstances, it simply defies common sense to conclude that this case does not involve government speech.

Had Congress elected to fund the activities under the Mushroom Act with taxpayer dollars, there would be no question that the program's speech was government speech. Simply because Congress made the decision to defray the program's cost by imposing what amounts to a modest user fee on those "who most directly reap the benefits of the programs," 7 U.S.C. § 7401(b)(2)—and

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tions, public school prayer, and busing." 496 U.S. at 15. The Act in this case expressly prohibits spending for such political activities, 7 U.S.C. § 6104(h), and limits permissible speech activities to commercial advertisements promoting mushrooms.

who as a group have voted to fund the program—does not change the essential character of the speech. It remains the government's message, with the content specified by Congress and articulated under the guidance and control of the Secretary.

This is a far cry from a case in which the government attempts to compel adherence to its own message, as was the case in *West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624 (1943), where students were faced with expulsion and prosecution for failing to participate in the Pledge of Allegiance, or *Wooley* v. *Maynard*, 430 U.S. 705 (1977), where motorists were required to bear on their own vehicle license plates an ideological state motto they found morally objectionable. The respondent in this case faces no such ideological dragooning. The marketing order simply requires it to pay a user fee; it neither "compel[s] [it] to utter what is not in [its] mind," *Barnette*, 319 U.S. at 634, nor makes it "the courier for [the government's] message." *Wooley*, 430 U.S. at 717. That is, no one has asked respondent to express *its* support of mushroom promotion, as in *Barnette*, or to bear such a message on *its* property, as in *Wooley*. For the government to compel political or ideological speech from the lips of a reluctant entity is worlds apart from compelling that entity to contribute financially to support government-supervised commercial speech, when that speech directly benefits its own commercial interests. *See NAACP* v. *Hunt*, 891 F.2d 1555, 1566 (11th Cir. 1990) ("Government communication is legitimate so long as the government does not abridge an individual's 'First Amendment right to avoid becoming the courier for such message.' ") (quoting *Wooley*, 430 U.S. at 717).

Justice Harlan made the same point in *Lathrop* v. *Donohue*, 367 U.S. 820, 858 (1961) (concurring in the judgment):

> What seems to me obvious is the large difference in degree between, on the one hand, being compelled to raise one's hand and recite a belief as one's own, and, on the other, being compelled to contribute dues to [an organization] fund which is to be used in part to promote the expression of views in the name of the organization (not in the name of the dues payor), which views when adopted may turn out to be contrary to the views of the dues payor.

Society frequently calls upon its members to pay taxes, dues, or other assessments to support various organizations and entities both governmental and non-governmental. But no one thinks that everyone who makes such a payment thereby endorses to the last jot and tittle the agenda of the recipient, because "the connection between the payment of an individual's dues and the views to which he objects is factually so remote." *Id.* at 859.

In sum, the speech at issue in this case is speech by a Council established pursuant to federal law to achieve defined governmental objectives. The members of the Council are appointed by a government officer, and its activities are subject to his direction and control. The message that is conveyed by the Council is the government's message. The fact that it is funded by assessments on those who benefit most directly from the government program—and who have by a vote elected to fund such a program—does not make the speech the forced speech of someone else. It remains government speech, and the fact that some of those compelled to

support it—who are free to speak their own mind on the subject—may object to the government's message does not give rise to a First Amendment violation.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

WAYNE R. WATKINSON
RICHARD T. ROSSIER
MCLEOD, WATKINSON & MILLER
One Massachusetts Ave., N.W.
Washington, D.C. 20001
(202) 842-2345

JOHN G. ROBERTS, JR.*
DAVID G. LEITCH
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5810

*Counsel of Record

Counsel for Amicus Curiae